EHSAN ARMADA SDN BHD v. KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN J
[CIVIL APPEAL NO: WA-14-31-06-2020]
20 SEPTEMBER 2022

Abstract – *(i) The courts have recognised that a payment made to remove an impediment or obstacle to a profitable trading, or that results in the increase of income, is attributable to revenue. The payment/contribution could not be said to be of capital in nature; and (ii) an expenditure that is not expressly disallowed should be allowed as a deduction and not be disallowed merely on policy basis.*

REVENUE LAW: *Income tax – Exemption – State Authority exempted property developer from requirement on housing project – Property developer's claim for deduction of payments disallowed and penalty was imposed – Whether payment/contribution made to State Authority to obtain exemption deductible – Whether property developer negligent – Whether notices of assessments and additional assessments and notification of non-chargeability for years of assessments could be raised – Whether time-barred – Income Tax Act 1967, ss. 33(1), 39(1), 44(6), 91(3) & 113(2)*

The appellant, a property developer, was informed by the Selangor Housing and Property Board that the Selangor State Government had agreed to exempt the appellant from the requirement to build low, medium low and medium costs housing on its housing project ('exemption'). Following an audit visit on the appellant's business premises, the respondent had, however, disallowed the appellant's claim for deduction of payments for the exemption for years of assessments ('YAs') 2007 to 2010 ('payment/contribution'). A penalty at the rate of 45% was also imposed on the assessments and additional assessments raised by the respondent for YAs 2007, 2008 and 2010. By the deciding order, the Special Commissioners of Income Tax ('SCIT') disallowed the appellant's appeal against the additional assessments, assessments and notification of non-chargeability raised by the respondent. The SCIT decided that (i) the payment/contribution made by the appellant to obtain the exemption was not deductible under s. 33(1) of the Income Tax Act 1967 ('ITA'); (ii) the appellant had been negligent and, as such, the respondent was not time-barred under s. 91(3) of the ITA from raising the notices of assessments and additional assessments and notification of non-chargeability for the YAs 2007 to 2010 against the appellant; and (iii) the respondent was correct, in fact and in law, in imposing the penalties under s. 113(2) of the ITA of the assessments and additional assessments raised for the YAs 2007, 2008 and 2010. Hence, the present appeal by the appellant against the decision of the SCIT.

Held (allowing appeal):

(1) There was a need to take a holistic approach in the appellant's business in its entirety and the purpose of the payment/contribution. The housing project was how the appellant would derive its income. By making the payment/contribution, the appellant had the option to build other types of units that could produce more money and yield greater profit. The payment/contribution were part and parcel of the expenditure that the appellant had to incur in producing its income from the project. It was clear that the payment was made in the course of operating the appellant's business and to carry on with its main activity *ie*, selling houses. An expenditure was not disqualified from deduction because the expenditure involved the attainment of profit. (para 16)

(2) The expenses or payments incurred by the appellant were not just 'wholly and exclusively' borne for the purpose of generating income. It was also closely related, incidental and relevant to the appellant's business. By making the payment/contribution, the applicant could carry on with the development of the project, which had been completed and generated income. Thus, such payment/contribution should be made deductible under s. 33(1) of the ITA. The payment/contribution was made so as to enable the appellant to widen its group or class of people it could sell to. The payment/contribution was, therefore, business normal payment in order to produce income. (paras 17 & 22)

(3) There was a wrong appreciation of facts by the SCIT. Since the SCIT had stated that the payments made to the State Authority was a contribution and an aid or support to the State Government but not wholly and exclusively incurred in the production of gross income, the only thing left was that the payment/contribution was in the nature of a gift/contribution. In such a case, the payment/contribution was deductible under s. 44(6) of the ITA which explicitly provided that a gift of money made in the basis year to a State Government or local authority was deductible for that year in arriving at the total income. An expenditure may be deducted even though it was voluntarily incurred. It was not necessary that it should be incurred pursuant to some contractual, statutory or other legal obligations. In addition to that, an expenditure that is not expressly disallowed should be allowed as a deduction and not be disallowed merely on policy basis. The SCIT failed to appreciate that the payment/contribution was not stipulated as non-deductible under s. 39(1) of the ITA which expressly provided for the disallowance of the deduction of certain expenses. The fact that the State Government provided an exemption from building low-cost houses suggested that it was clearly within the law. There was no issue of public policy. The money goes back to the State Government to fund the development of low-cost housing. (paras 26-29)

(4) All the assessments and additional assessments had been raised more than five years from the expiration of the YAs in question. The respondent was time-barred, by virtue of s. 91(1) of the ITA, from raising any assessments or additional assessments. The SCIT erred, in law and in fact, in finding that there was an element of negligence when the appellant had agreed to some other issues raised by the respondent from the audit. It was not clear from the testimony of the respondent's witness as to what were the issues that the appellant had agreed to from the audit. The question that needed to be asked was whether the negligence had given rise to any loss of tax. In other words, the negligence must match with the assessments being raised. Issues other than the assessment, even if agreed upon by the taxpayer during or from the audit, could not defeat the time bar under s. 91(1) of the ITA. (paras 30 & 32)

(5) Unless the respondent could show that the appellant had acted in bad faith or refused to give cooperation and failed to make a full and frank disclosure, the penalty was unwarranted. Even if the payment/ contribution was deductible, the present matter would involve only a technical adjustment and did not merit the imposition of penalties. The appellant had taken a reasonable and genuine position in submitting its returns and took the view that the payments made to the State Government were deductible. The appellant had acted in good faith and made full disclosure. There was no evidence that the appellant was attempting to evade the tax. The decision of the SCIT was reversed. (paras 34-36)

Case(s) referred to:

Ampat Tin Dredging Ltd v. Director-General Of Inland Revenue [1982] CLJ 193; [1982] CLJ (Rep) 402 HC ***(refd)***

British Columbia Ltd v. Canada [1999] 3 SCR 804 ***(refd)***

British Insulated and Helsby Cables Limited v. Atherton [1926] AC 205 ***(refd)***

Chua Lip Kong v. Director-General Of Inland Revenue [1981] 1 LNS 157 PC ***(refd)***

DGIR v. LTS [1985] 1 BLJ 166 HC ***(refd)***

Director-General Of Inland Revenue v. Kulim Rubber Plantations Ltd [1980] 1 LNS 141 FC ***(refd)***

Exxon Chemical (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2005] 4 CLJ 810 CA ***(refd)***

Infra Quest Sdn Bhd lwn. Ketua Pengarah Hasil Dalam Negeri [2015] 1 LNS 738 HC ***(refd)***

Inland Revenue v. Carron Company 1968 SC (HL) 47 ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Firgos (M) Sdn Bhd [2014] 8 CLJ 943 HC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Woodville Development Sdn Bhd [2013] 1 LNS 1362 HC ***(refd)***

Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri [1994] 3 CLJ 540 SC ***(refd)***

National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue [1993] 4 CLJ 339 SC ***(refd)***

Strong & Co of Romsey Limited v. Woodifield (1906) AC 448 ***(refd)***

Legislation referred to:
Income Tax Act 1967, ss. 33(1), 39(1), 44(6), 91(1), (3), 113(2), Schedule 5 para. 34

For the appellant - William Wong; M/s Raja, Darryl and Loh
For the respondent - Muazmir Mohd Yusof, SRC & Nordiana Sham; Revenue Counsel

Reported by Najib Tamby

JUDGMENT

Noorin Badaruddin J:

[1] This is an appeal by way of case stated pursuant to para. 34 of Schedule 5 of the Income Tax Act, 1967 ("ITA") against the whole decision of the Special Commissioners of Income Tax (the "SCIT") as contained in the deciding order dated 30 August 2019.

Background Facts

[2] The appellant is a company incorporated in Malaysia whose principal activity is that of property development.

[3] On 23 November 2006, the appellant was informed by the Lembaga Perumahan dan Hartanah Selangor ("LPHS") that the Majlis Kerajaan Negeri Selangor had agreed to exempt the appellant from the requirement to build low-cost, medium-low-cost and medium-cost housing on its Mutiara Indah housing project in Puchong, Selangor ("the exemption").

[4] Consequence to an audit visit on the appellant's business premises several issues were raised by the respondent in their audit finding letter dated 28 July 2016. Thereafter, the respondent has disallowed the appellant's claim for deduction of payments for the exemption for year of assessments ("YAs") 2007, 2008, 2009 and 2010 ("payment/contribution").

[5] A penalty at the rate of 45% had also been imposed on the assessments and additional assessments raised by the respondent for YAs 2007, 2008 and 2010.

[6] By the deciding order, the SCIT unanimously disallowed the appellant's appeal made by way of Form Q against the additional assessment, assessments and notification of non-chargeability raised by the respondent.

Summary Of The SCIT's Decision

[7] Summarily, the SCIT had decided that:

(i) the payment/contribution amount made by the appellant to the Selangor State Government to obtain the exemption is not deductible under s. 33(1) of the ITA;

(ii) the appellant had been negligent and as such the respondent is not time-barred under s. 91(3) of the ITA from raising the notice of assessment (Form J), notice of additional assessment (Form JA) and notification of non-chargeability (Form NL) for the YAs 2007, 2008, 2009 and 2010 against the appellant; and

(iii) the respondent is correct in fact and in law in imposing the penalties under s. 113(2) of the ITA on the assessments and additional assessment raised for the YAs 2007, 2008 and 2010.

Summary Of The Appellant's Contentions

[8] Summarily, it is the appellant's contention that:

(i) the payment/contribution it made to the LPHS are deductible expense under s. 33(1) of the ITA being payments made wholly and exclusively in the production of gross-income;

(ii) the assessments raised by the respondent are time-barred by s. 91(1) of the ITA and the respondent has failed to prove the exception of the time bar *ie*, that the appellant has committed fraud, wilful default or negligent;

(iii) the SCIT misdirected themselves and erred in law and in fact in failing to take into account that the discretion to impose penalty is not unfettered and ought to be exercised properly and reasonably.

Summary Of The Respondent's Contentions

[9] It is the respondent's position that the true nature and character of the expenses incurred by the appellant in making the payment/contribution is to obtain approval for the exemption from the State Authority and the appellant gets to build free market houses instead of the low and/or medium cost houses. Thus, it is submitted that the payment/contribution is capital in nature and not incurred wholly and exclusively in the production of income. It is further submitted that the payment/contribution to the State Authority to release the appellant's obligation to build the low-cost/medium-low-cost/medium-cost apartments and to procure right to build free market houses was made at the stage before the commencement of the development for the houses and it is not part of the development cost.

Findings

[10] It is settled law that in an appeal against the deciding order of the SCIT, it is open for the High Court to review the decision of the SCIT if the SCIT misdirect themselves on the law, answer the wrong questions or took into account factors which they ought not to have or reached a conclusion on the facts which is not supported by the evidence before them or made a finding of facts which no reasonable person in the circumstances would have

A arrived at (see: *Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 541 and *Chua Lip Kong v. Director-General of Inland Revenue* [1981] 1 LNS 157).

[11] The first issue to be determined herein is whether the SCIT was correct in deciding that the expenses incurred by the applicant in the sum of B RM6,226,981 paid to the LPHS for the exemption from the requirement to build low-cost apartments on its Mutiara Indah housing project in Puchong, Selangor in YAs 2007, 2008, 2009 and 2010 are not deductible under s. 33(1) of the ITA.

C **[12]** The SCIT in the case stated took the view that the payment/ contribution made to the State Authority *via* the LPHS by the appellant is not a payment directly related to the appellant's main activity *ie*, property development. The SCIT was of the view that in seeking for an exemption from building the low-cost, medium-low-cost and medium-cost houses which was a condition earlier imposed by the State Authority, the payment/ D contribution was made to release the appellant from the obligation or condition imposed. As such, it is the SCIT's finding that the payment is not expenses 'wholly and exclusively incurred in the production of gross income from that source' under s. 33(1) of the ITA.

E **[13]** The question whether a particular payment is capital or revenue is basically a question of fact and every case must be considered on its own facts (see *Ampat Tin Dredging Ltd v. Director-General Of Inland Revenue* [1982] CLJ 193; [1982] CLJ (Rep) 402; [1982] 2 MLJ 46 and *Director-General Of Inland Revenue v. Kulim Rubber Plantations Ltd* [1980] 1 LNS 141; [1981] 1 MLJ 214).

F **[14]** It is an unchallenged fact that the proposed site for the appellant to build the low-cost houses was situated on a class three slope which according to the appellant has resulted to building the lower costs units not profitable as it involves a higher cost. In its letter to LPHS dated 19 September 2006, G the appellant had explained that when earthwork began at the housing project, it was discovered that many large rock formations occurred in phases one and two where the costs of breaking the rocks took a sharp rise in costs which puts a greater strain on profit and development of the project. The appellant had to make a choice of either having to halt the project or obtain the exemption. The appellant being unable to satisfy the condition imposed H on the planning permission and in order to carry on with the project, opted to obtain an exemption.

[15] It is important to note that in the present matter, the appellant was not granted with the right to build the low and medium cost houses. To build the low and medium cost houses or units is just a requirement. The SCIT I took the view that the payment/contribution made by the appellant was to discharge the latter from the requirement to build low-cost houses that are not subject to price control and for the appellant to build more expensive

houses/units. However, the fact is, the payment/contribution made by the appellant to LPHS was for exemption from building the lower cost houses. This is in line with the Pekeliling Pengarah Tanah dan Galian Selangor Bilangan 3/2007 ('the circular') where at para. 3.5.2 it is stated that, "Sekiranya didapati tapak cadangan tersebut tidak sesuai untuk projek pembangunan perumahan pangsa kos rendah atau rumah kos rendah, pemaju akan diberi pengecualian ...". Therefore, it is of the considered view that the SCIT erred in law and fact in failing to appreciate that the payment/contribution was not made in order to build more expensive units.

[16] There is a need to take a holistic approach in the appellant's business in its entirety and the purpose of the payment/contribution. The housing project is how the appellant would derive its income. By making the payment/contribution, the appellant has the option to build other types of units that can produce more money and yield greater profit. The payment/contribution are part and parcel of the expenditure that the appellant has to incur in producing its income from the project. The appellant either had to build the lower cost units or make the payments to LPHS. It is clear that the payment was made in the course of operating the appellant's business and to carry on with its main activity *ie*, selling houses. It can be comprehended that for commercial and business reason, the appellant had decided to make the payments to LPHS to enable the appellant to conduct its business on a more profitable basis as making the payment/contribution is more profitable to the appellant than building the lower cost units. An expenditure is not disqualified from deduction because the expenditure involves the attainment of profit.

[17] It is of the considered view that the expenses or payments incurred by the appellant are not just "wholly and exclusively" borne for the purpose of generating income, it is also closely related, incidental and relevant to the appellant's business. By making the payment/contribution the applicant could carry on with the development of the project, which has now been completed and generate income. Thus, such payment/contribution should be made deductible under s. 33(1) ITA.

[18] In *Strong & Co of Romsey Limited v. Woodifield* (1906) AC 448 at p. 452, it was held that in order for an expense to be deductible, it must be closely connected or incidental to the business. Lord Loreburn said as follows:

> In my opinion, however, it does not follows that if a loss is in any sense connected with the trade, it must always be allowed as a deduction; for it may be only remotely connected with the trade, or it may be connected with something else quite as much as or even more than with the trade. I think only *such losses can be deducted as are connected with in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader. The nature of the trade is to be considered*.
>
> (emphasis added)

[19] The choice to seek the exemption is a commercial and business decision of the appellant. With the exemption, there is nothing wrong in the appellant's plan to build higher cost units. The development on the land in question can produce greater profit because the appellant now has the choice on what type of unit to build.

[20] It is clear that in seeking for the exemption from the obligation imposed in building the lower costs houses, the payment/contribution made by the appellant to LPHS was to remove the obligation or impediment to greater profit. The courts have recognised that a payment made to remove an impediment or obstacle to profitable trading or that result in the increase of income is attributable to revenue. In *Inland Revenue v. Carron Company* 1968 SC (HL) 47, the taxpayer was incorporated by royal charter. The charter seriously impeded the profitable development of the company's business because it limited the company's borrowing powers and also restrictions on share transfers made it difficult to attract executives of a suitable calibre. The company decided to seek a supplementary charter to eliminate these impediments but some dissenting shareholders took legal action to indefinitely delay the matter. Eventually a settlement was negotiated, and the company paid £88,000 to the dissenting shareholders and £3,107 to obtain the supplementary charter. The House of Lords held that an allowable deduction was available for both these items. The money was spent to remove restrictions that prevented profits from being earned. There was no creation of new assets. The removal of the disadvantages by the supplementary charter enabled the company's business to be carried on more efficiently and in its day-to-day trading and therefore the advantage obtained was an income advantage.

[21] In the case of *Director-General Of Inland Revenue v. Kulim Rubber Plantations Ltd* [1980] 1 LNS 141; [1981] 1 MLJ 214 the taxpayer owned extensive rubber plantations. It decided on a new policy by embarking on a large-scale programme of oil-palm planting. To implement this policy and to raise funds it decided on selling the more outlying and less profitable rubber estates. The taxpayer had also employed agents and secretaries in the conduct of its business and had agreed that in the event of the sale of the whole or part of the estates, they would be entitled to compensation. The Federal Court held that where a company, in order to get rid of a contract which is of an onerous character or a servant whose continuance in service is undesirable in the company's interest makes a payment in such circumstances, it is properly to be treated as a revenue payment and a deductible expense.

[22] It is of the considered view that the payment/contribution cannot be said to be of capital in nature since the appellant has all along, the right to sell. The payment/contribution was made so as to enable the appellant to widen its group or class of people it can sell to. The payment/contribution was therefore business normal payment in order to produce income.

[23] In *British Insulated and Helsby Cables Limited v. Atherton* [1926] AC 205 at p. 212 of the report, Viscount Cave LC of the House of Lords had stated as follows:

> It was made clear in the above cited cases of *Usher's Wiltshire Brewery v. Bruce (1)* and *Smith v. Incorporated Council of Law Reporting for England and Wales* (2) that *a sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade*.
>
> (emphasis added)

[24] It must be emphasised that in obtaining the exemption, the appellant does not acquire any asset or advantage for the enduring benefit of its business. As stated earlier, a payment made to remove an impediment or obstacle to profitable trading does not create any new asset or enduring benefit and is attributable to revenue. In *Carron Company* (*supra*) the House of Lords stated:

> *Of course they obtained an advantage: companies do not spend money either on capital or income account unless they expect to obtain an advantage*. And money spent on income account, for example on durable repairs, may often yield an enduring advantage. *In a case of this kind what matters is the nature of the advantage for which the money was spent This money was spent to remove antiquated restrictions which were preventing profits from being earned. It created no new asset. It did not even open new fields of trading which had previously been closed to the company. Its true purpose was to facilitate trading by enabling the company to engage a more competent manager and to borrow money required to finance the company's traditional trading operations under modern conditions.*
>
> (emphasis added)

[25] It must be borne in mind that the same type of asset may be either a fixed asset or stock-in-trade according to the nature of the business. What is a capital asset in the hands of one person, may be a trading asset in the hands of another, and the nature of a receipt may consequently vary according to the nature of the trade in connection with which it arises. The units that a property developer builds are part of his stock-in-trade. It is of the considered view that the units that the appellant were developing in its Mutiara Indah Housing Project therefore were the stock-in-trade of the appellant's trade. The appellant receives income from the sale of these units. The payment/contribution was made in order to carry on with the development of the units and to sell the same. That goes a long way to stamp it with the character of a revenue payment. The effect of the payment/contribution was to achieve sales and quite the opposite from being related to a capital asset, the payment/contribution is related to the appellant's stock-in-trade.

[26] This court finds that there is a wrong appreciation of facts by the SCIT where they had taken into account facts that ought not to have been taken into account. Firstly, the SCIT had stated that the appellant already received

a reward or return by making the payment/contribution. The SCIT was of the view that if the appellant were allowed to make a claim for deduction, the appellant would profit many times over, *via* the development and sale of more expensive houses that are not subject to price control, and a reduction in chargeable income. At the risk of repetition, for an expenditure to form an allowable deduction under s. 33(1) ITA, it must be necessarily incidental and relevant to gaining or producing income. It must be made to earn profits (see: *Kulim Rubber Plantations Ltd* (*supra*)). An expenditure is not disqualified from deduction because the expenditure involves the attainment of profit. A taxpayer's profit will always be taxable once a proper deduction is made.

[27] Further, since the SCIT had stated that the payments made to the State Authority is a contribution and an aid or support to the State Government but not wholly and exclusively incurred in the production of gross income, this court agrees with the appellant's position that the only thing left is that the payment/contribution is in the nature of a gift/contribution. In such a case, the payment/contribution is deductible under s. 44(6) of the ITA which explicitly provides that any gift of money made in the basis year to a State Government or local authority is deductible for that year in arriving at the total income. It is trite that an expenditure may be deducted even though it is voluntarily incurred. It is not necessary that it should be incurred pursuant to some contractual, statutory or other legal obligation (see: *British Insulated And Helsby Cables Limited v. Atherton* (*supra*)). The payment/contribution therefore constitutes a gift under s. 44(6) of the ITA. In this regard, it is clearly stated in para. 3.5.3 of the circulars that:

> Pemaju yang diberi pengecualian syarat penyediaan tersebut dikehendaki membayar **sumbangan** kepada Kerajaan Negeri ...
>
> (emphasis added)

[28] Secondly, the SCIT had stated that in terms of public interest, the appellant is not entitled to make a claim for deduction because if allowed, it would encourage property developers not to build low-cost housing and leave the Government alone to address the housing problem of the low-income group. An expenditure that is not expressly disallowed should be allowed as a deduction and not be disallowed merely on policy basis. The SCIT has failed to appreciate that the payment/contribution is not stipulated as non-deductible under s. 39(1) of the ITA which expressly provides for the disallowance of the deduction of certain expenses. The principle that one can only look fairly at the language used and what is clearly said and that nothing is to be read nor implied, must not be regarded (see: *National Land Finance Co-operative Society Ltd v. Director General Of Inland Revenue* [1993] 4 CLJ 339). There is also the principle that a provision in a taxing statute must be read strictly is one that is to be applied against the revenue and not in its favour and if there is any doubt, it must be resolved in the taxpayer's favour (see: *Exxon Chemical (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2005] 4 CLJ 810). Further, as stated in *British Columbia Ltd v. Canada* [1999]

3 SCR 804, the courts should be reluctant to embrace unexpressed notions of policy or principle in the guise of statutory interpretation. So also, in the case of *DGIR v. LTS* [1985] 1 BLJ 166; [1985] 1 MTC 166, the High Court, when considering the deductibility of payments made by the taxpayer under illegal contracts had observed that it does not appear appropriate to import any assumed moral or ethical standard in allowing deductions.

[29] In any event, the fact that the State Government provides an exemption from building low costs houses suggests that it is clearly within the law. There is no issue of public policy. The money goes back to the State Government to fund the development of low-cost housing. The SCIT said so themselves in the case stated. In the case of *British Columbia Ltd* (*supra*), the taxpayer carried on a poultry farm business. The BC Egg Marketing Board established a quota system whereby egg producers in the province were assigned quotas for egg production. Due to local market conditions, the taxpayer decided to produce over-quota. The taxpayer was concerned that if it did not produce over quota, it would lose its major customer, which was expanding in the area. An inspector from the BC Egg Marketing Board discovered the over-quota on the taxpayer's farm and the taxpayer paid an over-quota levy. The court held that the over-quota levy was an allowable deduction. The levy was incurred as part of the taxpayer's day-to-day operations, and the decision to produce over-quota was a business decision made in order to realise income. The court said that allowing the over-quota to be deducted does not undermine its function as:

> ... the money still goes to the compensatory scheme. Thus, it would not undermine the charging statute for these levies to be deducted from a taxpayer's income.

[30] Moving on to the next issue, this court finds that all the assessments and additional assessment herein have been raised more than five years from the expiration of the YAs in question. It is therefore clear that the respondent is time-barred by s. 91(1) of the ITA from raising any assessment or additional assessment. Section 91(1) of the ITA states:

> Assessments and additional assessments in certain cases
>
> 91. (1) The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within six years after its expiration make an assessment or additional assessment, as the case may be, in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year.

[31] The SCIT found that there was negligent on the part of the appellant in applying for the deduction from the payment/contribution. Apparently, the allegation that the appellant had been negligent was first raised by the

respondent for the first time during the hearing before the SCIT through the witness statement of one Rafizah binti Abdul Rahman (RW1). It is clear that the burden in proving that the appellant had failed to exercise the standard of care that a reasonable prudent person would have exercised in a similar situation or that the appellant had omitted to do something that a reasonable man would do or had done something that a prudent and reasonable man would not do, rest upon the respondent (see: *Infra Quest Sdn Bhd lwn. Ketua Pengarah Hasil Dalam Negeri* [2015] 1 LNS 738; [2017] 7 MLJ 35). In this case there are genuine reasons as to why the appellant has taken the deductions as alluded to in the above. Section 91(3) ITA states:

> 91(3) The Director General where it appears to him that:
>
> (a) any form of fraud or wilful default has been committed by or on behalf of any person; or
>
> (b) **any person has been negligent, in connection with or in relation to tax, may at any time make an assessment** in respect of that person for any year of assessment **for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question**.
>
> (emphasis added)

[32] This court finds that the SCIT has erred in law and fact when they found that there is an element of negligence when the appellant had agreed to some other issues raised by the respondent from the audit. It is not clear from the testimony of the respondent's witness as to what were the issues that the appellant had agreed to from the audit. The question that needs to be asked is whether the negligence has given rise to any loss of tax. In other words, the negligence must match with the assessment being raised. Issues other than the assessment even if agreed upon by the taxpayer during or from the audit cannot defeat the time-bar under s. 91(1) of the ITA.

[33] Lastly, in regard to the penalty imposed by the respondent, this court takes the view that unless the respondent can show that the appellant has acted in bad faith or refused to give cooperation and failed to make a full and frank disclosure, the penalty is unwarranted. Throughout the course of the audit, there is no dispute that the appellant had provided the respondent with all documents and information requested. From the appellant's letter of 1 September 2016, the appellant had also explained to the respondent the specific circumstances surrounding the exemption and payment/contribution.

[34] Even if the payment/contribution is deductible, it is of the considered view that the matter herein would involve only a technical adjustment and does not merit the imposition of penalties. This is not a case where the taxpayer had filed an incorrect return by omitting or understating its income or gave incorrect information relating matter affecting its chargeability to tax. The appellant had taken reasonable and genuine position in submitting its

returns and took the view that the payments made to the State Government were deductible. The courts have held that in matters of technical adjustments, no penalty should be imposed as there is no intention to evade tax (see: *Ketua Pengarah Hasil Dalam Negeri v. Woodville Development Sdn Bhd* [2013] 1 LNS 1362; [2013] 3 MLJ 832 at 845). There is no evidence to show that the appellant is attempting to evade the tax.

[35] This court is satisfied that the facts of the case disclose that the appellant had acted in good faith and made full disclosure. In *Ketua Pengarah Hasil Dalam Negeri v. Firgos (M) Sdn Bhd* [2014] 8 CLJ 943, Zaleha Yusof J (as she then was) stated as follows:

> [17] On the second issue, even the appellant's witness agreed that all the capital expenditures claimed for reinvestment allowance purposes were actually incurred by the respondent. During the cross-examination, he agreed that the respondent had made full disclosure in the Borang that were submitted in the Years of Assessment 2005-2007 and agreed that the audit team did not discover anything contrary to the information disclosed in the Borang. I therefore agree with the SCIT that the respondent had acted in good faith and made full disclosure. In *Ketua Pengarah Hasil Dalam Negeri v. Kim Thye & Co* [1992] 4 CLJ 2079; [1992] 1 CLJ (Rep) 135; [1992] 2 MLJ 708 it was highlighted that s. 113(2) of the ITA is not a mandatory provision. *This section clearly confers discretion on the appellant as to whether penalty should be imposed or not. What more the matter in dispute arose as a result of technical adjustment ie, due to a differing interpretation of the tax legislation by the respondent*.
>
> (emphasis added)

Conclusion

[36] Premised on the above, the appeal was therefore allowed and the decision of the SCIT, reversed.